

# McNamara Declaration

## Exhibit 46

### part 3

## Project Risk Management

Our greatest risk lies in working with in-copyright books. Over the last decade, there have been two major copyright lawsuits<sup>1</sup> against libraries. In both cases, libraries have prevailed, greatly expanding what they can do with in-copyright materials under fair use.

### **This project expands ebook access in five ways:**

- 1) **To the certified print disabled**—defined as the visually impaired, people with perceptual disabilities such as dyslexia, and those with physical disabilities unable to manipulate books. Explicitly permitted by statute.<sup>2</sup>
- 2) **To researchers**—for “non-consumptive” data analysis.<sup>3</sup> Upheld by US court.<sup>4</sup>
- 3) **To journalists & Wikipedia editors**—for “snippets” when citing books for footnotes or fact checking. Upheld by US court.<sup>5</sup>
- 4) **To libraries for distributed preservation**—digitize a book once and make it available to libraries owning the physical book. Upheld by US court.<sup>6</sup>
- 5) **To authorized U.S. library patrons**—by providing controlled digital lending (CDL) of library materials. IA has operated OpenLibrary.org with CDL for 6 years, without contest.

In May 2017, copyright scholar, Pam Samuelson, convened a workshop of twenty fair use experts to consider each of the cases above. They agreed that #1-4 are clearly supported by the Chafee Amendment,<sup>7</sup> the Marrakesh Treaty, and recent court decisions. Therefore, we believe there’s minimal risk in executing large-scale book digitization for the print disabled in 29 countries and transformative uses for journalists and educators. Distributing

copies to libraries is also sanctioned.

The risk, if any, lies in providing temporary digital access to a library's physical books (#5). Following Samuelson's meeting, copyright experts began crafting a joint "Statement on Controlled Digital Lending of Physical Library Collections," (see Technical Review) to build widespread understanding of this legal framework.

However, neither IA nor its library partners is interested in lawsuits. For 20 years we have worked successfully with legal advisors and publishers to help avoid them. One reason we maintain good relations is that we avoid creating negative market effects by purchasing publisher's products when available.

We follow a "bend not break" approach to takedown requests: by engaging with rights holders, explaining our nonprofit mission, and when necessary, removing an item from our site. Since IA's lending library launched in 2011, approximately 116 rights holders inquired about takedown; 64% chose to leave their books on archive.org once they understood we make no money from their content. By showing authors respect, we have made 540,000 modern works from 100 libraries available since 2011 via OpenLibrary.org, all without incident.

We're also actively working with authors and publishers whose goal is to expand readership. Houghton-Mifflin-Harcourt and MIT Press have signed MOUs allowing us to scan their backlists and lend them via OpenLibrary.org. We're partnering with the Author's Alliance, supporting writers who own digital rights to their books. We've engaged in conversation with Authors Guild Executive Director, Mary Rasenberger.



**Open Libraries**

a project by the Internet Archive

**Internet Archive**

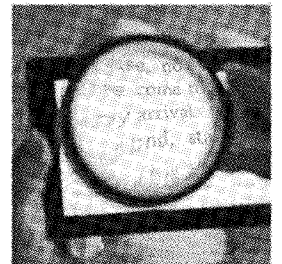
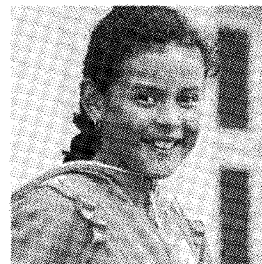
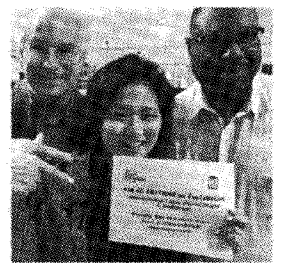
***100&Change***

To further reduce risk, we can control which ebooks we lend; we will start by avoiding textbooks and newer titles publishers may already license to libraries.

We monitor our files for cyber threats and maintain multiple copies in different locations.



## F. Financial Strength and Stability





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With IA's core services stable, in 2014 our founder, Brewster Kahle, decided to make a strategic shift. IA would focus on making its 30 petabytes of cultural heritage materials have greater impact for our 1+M daily patrons. Kahle also wanted to add resiliency to our finances and staffing. From 2014-2016, we added 5 new directors and 21 staff (**22% increase**), including key second-in-command positions. **IA's total budget increased 21%.** (See 2014-2016 financials.)

Since 2006, IA has run **two successful fee-based technology services** that allow us to grow our collections, while financing the teams that maintain them: **Web Archiving [\$3.7M]** and **Book Scanning [\$5.4M]**. Earned income in 2016 was **\$9.4 million (55% of our total annual budget)**. Over the last five years, earned income has comprised a healthy 54-62% of our total expenses (**Exhibit A**). Between 2014-16, our Web Archiving service continued to grow at a rate of 55%.

## Earned + Contributed Income vs Expenses 2012 - 2016

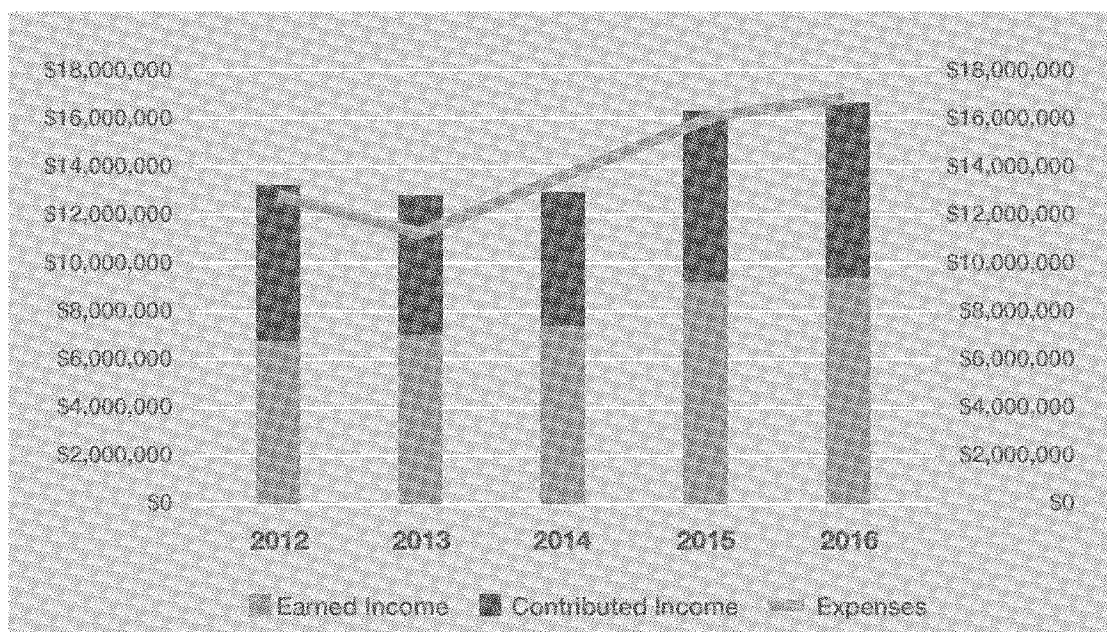


Exhibit A



This self-sustaining business model allows us to make 3 million books and 300 billion web pages accessible to all, for free.

The rest of IA's income comes from three sources: **foundation grants**, **small individual donors**, and **one major donor**. In 2014, IA added a Director of Partnerships who oversees institutional and individual giving, increasing foundation support by almost **\$3 million** in 2015. (Our periodic negative net income reflects grants reported on an accrual basis.) Foundations have contributed in excess of **\$17,745,000** over our 20-year history (**Exhibit B**). By design, IA does not depend on foundation funding for core services, only for one-time innovations or scaling. This ensures stability as grants fluctuate.

## Foundation Funding 1996 - 2017

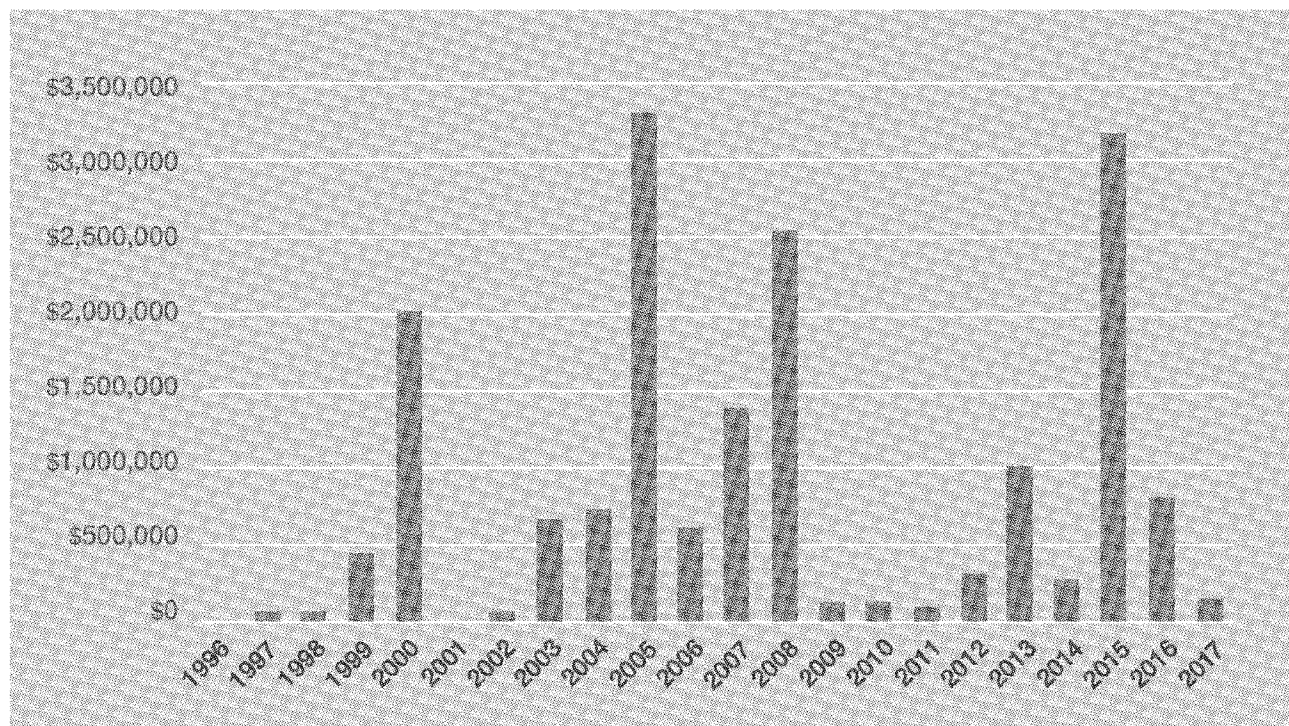


Exhibit B

**Open Libraries**

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**Individual Small Donors by Year 2012 – 2016**

YEAR	TOTAL DONATIONS	# DONORS	AVERAGE DONATION
2012	\$251,267*	1918	\$131.00
2013	\$461,988*	5314	\$86.94
2014	\$580,759*	14,071	\$41.27
2015	\$1,008,438	24,377	\$41.37
2016	\$1,471,000	38,054	\$38.66

\* = Does not include Bitcoin

**Exhibit C**

To add another stable funding source, IA launched its **first fundraising campaign in 2013**. By posting fundraising banners only at year's end, we've seen the number of **small donors grow 65%**, and **donations increase 46% annually** since 2014 (**Exhibit C**). In 2017, we expect our patrons will contribute \$2.1 million to sustain the services they've come to rely upon.

Meanwhile, **a single major donor, Brewster Kahle**, contributes the balance IA needs each year. Over the last five years, this amount ranged between **\$2.3 million to \$5.2 million (Exhibit D)**. As a strategy to mitigate risk, IA has never established an endowment; however it has a guaranteed source of philanthropic support to sustain its basic services in perpetuity. For similar reasons, the capital assets that the Internet Archive draws upon—its headquarters, warehouses, and some distributed data centers— are owned by other philanthropic entities whose missions are closely aligned with IA's.



The goal of our financial structure is to ensure the continued basic operation of the Internet Archive in perpetuity, with access to necessary storage at affordable rates, while minimizing the risk of exposure that a large endowment creates. We believe our business model will support continued growth through a sustainable flow of earned income. IA also has the potential to build new services on top of a digitize-and-lend operation for libraries. We are planning for the day when Kahle's financial contribution will be unnecessary.

## Individual Donations 2012 - 2016

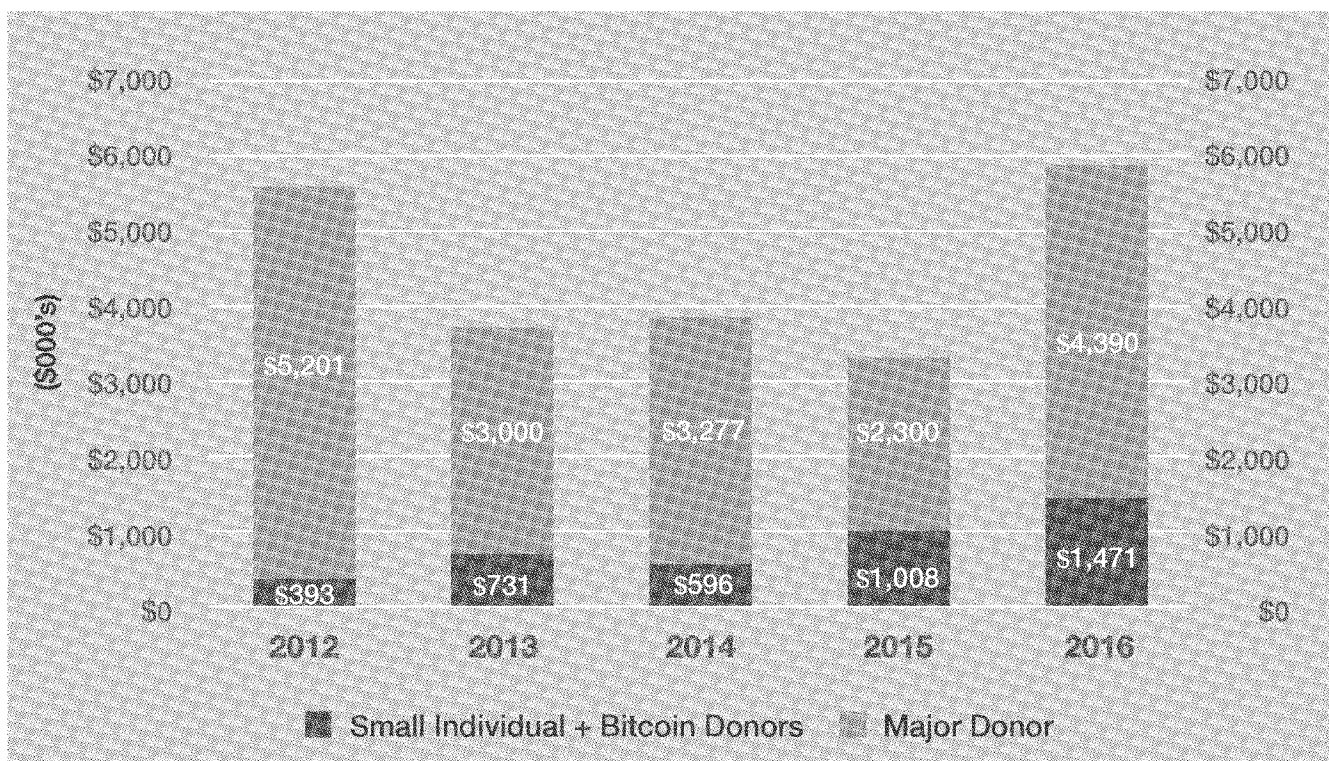
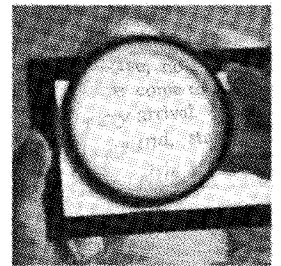


Exhibit D

## G. Technical





## Technical Explanation

*(This section focuses on technical legal questions—rather than technology.)*

*Open Libraries* will provide marginalized populations with access to millions of digitized books that they cannot access otherwise. We will do so by making public domain works available to all users without restriction (in contrast to Google, which places certain restrictions on its public domain scans) and in-copyright works available in a limited manner consistent with copyright law.

Providing digitized copies of works to certain populations, such as those with visual impairments, has already been codified,<sup>1</sup> so this response will focus only on the issue that has not been tested by courts: Controlled Digital Lending (CDL) which provides temporary digital access to a library book for a two-week period, one reader at a time. IA has employed CDL since 2011 via OpenLibrary.org without incident. OpenLibrary.org lending mirrors traditional library practices permitted by copyright law, and our project would enable other libraries to do the same: to lend only as many copies as they lawfully own and each copy only to a single user at a time, for a limited time.

We have structured our project to expand access to a “missing century of books” from 1924-on, while remaining respectful of copyright owner interests. We believe that CDL is fair use—a central tenet in United States copyright law, allowing for socially beneficial uses of a work without permission from the copyright owner in limited instances. Fair use serves the ultimate goal of copyright: to expand public knowledge and understanding. The Copyright Act provides four nonexclusive factors for courts to consider in determining whether a particular use is fair, discussed below.<sup>2</sup> When read together with the first sale right, which limits the rights of a copyright holder to control the further sale, donation, or lending of lawful copies of her work

once they have been distributed, fair use supports CDL for titles libraries already own in physical form.

Below we offer a more detailed understanding of how fair use and first sale work together to effectuate CDL practices:

### **Factor One: The Purpose and Character of the Use**

IA lends books “for nonprofit educational purposes.” These include providing access to information in order to encourage literacy, education, criticism, comment, news reporting, teaching, scholarship, and research, creating the informed citizenry essential to a functioning democracy. Both physical lending and CDL can facilitate these purposes, but CDL substantially enhances them by providing non-discriminatory access and informational self-sufficiency to people who live in rural communities, the elderly or physically disabled, and others for whom a trip to their local library is a barrier to access. These noncommercial and socially beneficial purposes strongly favor fair use,<sup>3</sup> especially given that the CDL one-to-one model effectuates the first sale right, which has been part of Anglo-American law for centuries and consistently codified in U.S. law by Congress.<sup>4</sup>

### **Factor Two: The Nature of the Copyrighted Work**

The published works lent may range from the highly factual to the highly creative, which could weigh for or against fair use in any given instance. Courts have generally recognized that this factor is rarely dispositive and must be considered in light of the other factors.<sup>5</sup>

### **Factor Three: The Amount and Substantiality of the Portion Used**

The amount used must be reasonable in light of the purpose of the use<sup>6</sup> and courts have found use of entire works fair for many purposes.<sup>7</sup> With CDL,



a user is granted temporary access to the entire work. After the two-week lending period, the user may no longer access the book, unless she checks it out again. If the library only owns one physical copy of the work, then additional users must join a waitlist. Just as it's reasonable and customary for brick-and-mortar libraries to lend out entire physical copies of books for a short period, providing temporary access to an entire digital work is reasonable for the purpose of short-term, controlled lending in response to a user's request for, and expectation of, access to the entire work.

### **Factor Four: The Market Effect**

Fair use jurisprudence recognizes a long-established principle that not all market harms are cognizable copyright injuries.<sup>8</sup> The classic example is the market harm from a negative book review—although sales may be lost, this does not “count” as harm under the fourth factor. Library lending is another such example, as it is based on the first sale right permitting certain harms to the original market of a work.<sup>9</sup> Indeed, the Supreme Court recently reaffirmed the principle that a copyright owner is not—and never has been—entitled to maximize every available profit.<sup>10</sup> While all library loans have the potential to substitute for users purchasing new copies of titles, any alleged market harm from such functions is accommodated by copyright law.<sup>11</sup> Given that CDL maintains the same number of circulating copies as physical loan systems and does not generate any profits for libraries, there is no evidence that CDL will create any greater market harm than the lending of physical books. Moreover, because CDL depends on all copies having been legitimately acquired, the rights holder will have been compensated for all CDL copies at the time of first acquisition. Maintaining the same “owned to loaned” ratio of library books in circulation, regardless of format, mitigates undue market harm. This factor strongly favors fair use.

**Open Libraries**

a project by the Internet Archive

Internet Archive

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Copyright law, court decisions, and scholarly works show it is likely that CDL is a winning fair use argument.<sup>12</sup> Further, libraries engaging in CDL need not digitize their own books in order to participate in CDL. Courts have recognized that libraries may contract with third parties to digitize books for the library's benefit when this is done for fair use purposes.<sup>13</sup> Accordingly, the provision of digitized versions of books libraries already own in order to engage in CDL is also legally permissible.

IA is no stranger to bringing massive collections of materials, from web pages and software to TV news and music, online. Our legal framework allows *Open Libraries* to do the same for books without breaking copyright rules.

## Conclusion

### How do we know we'll succeed?

#### Because we've done it before.

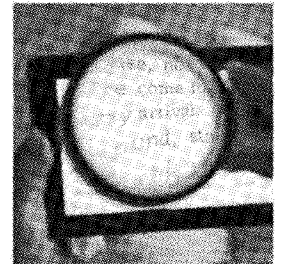
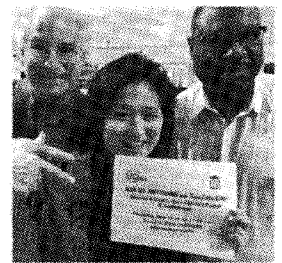
20 years ago, the Internet Archive invented some of the first crawlers capturing the web. We scaled that technology into a global service—the world's only free, public, long-term web archive, the “Wayback Machine.” Since then we've archived 298 billion web pages; by the time you read this, it'll be 300 billion. As Jill Lepore writes in the New Yorker, “If it's not in the Wayback Machine it doesn't exist.”<sup>1</sup>

Here's the thing to remember: when we launched in 2001, legal advisors told us we'd certainly be sued. After all, these billions of web pages are in-copyright. But here we are sixteen years later, without major incident, providing an indispensable social good.

Meanwhile, storing it all became expensive, so in 2006, we launched a web archiving service for paying customers. At one time, we crawled most of the world's domains for them, but a world with only one archive is a bad idea—so we gave the technology away. Today, most of the world uses our open source Wayback code. We helped establish a multi-stakeholder governing body to set standards for this new global ecosystem.

Who within 100 miles of Silicon Valley would build a tech monopoly, only to give it away? A social entrepreneur, a digital utopian, dedicated to launching an entire global field because it seemed no one else would. Where is the internet's memory? It's in our digital library. Together we can preserve all the books now, too.

## H. Ancillary Materials





# Evidence of Engagement

## Building the *Open Libraries* Community



**By 2020, we can spark a new ‘Carnegie Moment’ in which thousands of libraries unlock their analog collections for a new generation of learners, enabling free, long-term, public access to knowledge.**

**-Brewster Kahle**



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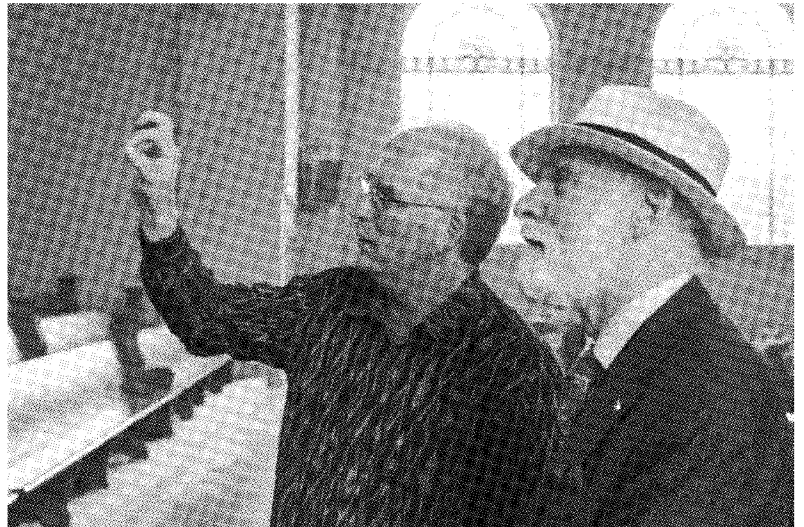
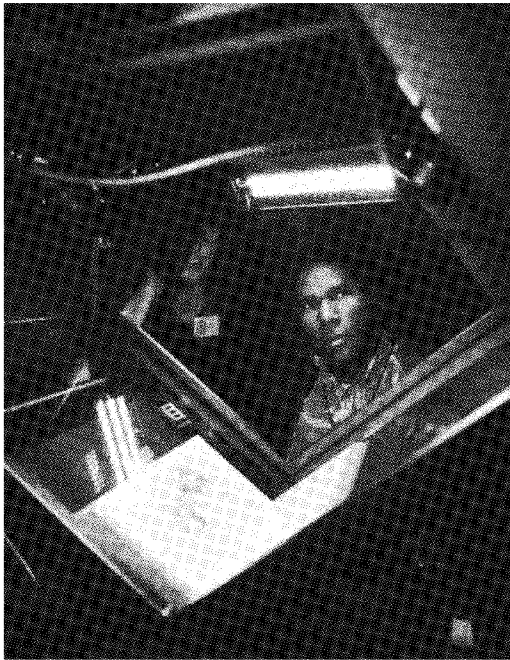
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# Evidence of Engagement

## Highlights from the Letters of Support





## Open Libraries Highlights from Supporters

A project such as now envisioned by IA's *Open Libraries*, with its aim to enable free public access to millions of digital books that would serve research, art, culture, and education, would fall squarely within the constitutional objectives that motivated the founders to enable the creation of copyright.

**Thomas Jefferson would support this initiative, and Benjamin Franklin too.**

*Pamela Samuelson  
Richard M. Sherman Distinguished Professor of Law & Information  
Berkeley Law, University of California*

The Internet Archive's proposal to digitize four million books would constitute the greatest single increase in accessible materials for the blind since the passage of the Pratt-Smoot Act, which created what is now the NLS, in 1931. It would benefit millions of blind people, both in the United States and around the world.

*National Federation for the Blind*

The more books that can be brought online, the more we can meet the goal of democratized access to knowledge and culture for all individuals and all communities. As individual libraries transform individual communities and individual lives, **an online library containing much of the cultural heritage of the Twentieth Century can help transform the world.**

*American Library Association*



Internet Archive

Highlights

Annually, **millions of undergraduate and graduate students would benefit** from this dramatic investment, replacing costly college textbooks with Open Educational Resources, on average saving students an estimated \$1000 or more per year.

*Martha Kanter, Ed.D., Executive Director  
College Promise Campaign @CivicNation  
U.S. Under Secretary of Education (2009-2013)*

Of all the incredibly worthy proposals you are considering as part of the 100&Change program, only the Internet Archive's—because of its focus on broad and socially just access to information, which is the chief driver of human creativity, liberty, and potential worldwide—promises to solve multiple problems **and be generative of an endless number of solutions.**

*Digital Library Federation*

Given HMH's long history, we are acutely aware that there are books and other historic materials that are no longer available for readers who may want to access them. Furthermore, there are readers today who do not even know that this important legacy of American literary history exists. We do not want this legacy to get lost and we are committed to preserving and making it accessible to all... The Internet Archive's Open Libraries will make HMH's books accessible to everyone, regardless of a reader's location, physical ability, or economic status.

*Houghton Mifflin Harcourt*

This effort breathes new life into older books, benefitting authors as well as readers around the globe.

*Amy Brand, Director  
MIT Press*

**Many organizations set ambitious goals. The Archive fulfills them.** As a result, the Archive has become an invaluable resource for people all over the world.

*Electronic Frontier Foundation*

**Brewster and his team understand big visions** — something the MacArthur Foundation has demonstrated a remarkable ability to discover and support.

*Vint Cerf, VP and Chief Internet Evangelist  
Google*

**There is no organization on Earth more committed to creating, preserving and distributing our digital heritage.** I say this as a former top engineering executive at Google and Facebook, as a co-founder of One Laptop per Child and its first CTO, and as a lauded technology innovator. When I die my estate is going to the Internet Archive.

*Dr. Mary Lou Jepsen*

Keeping valuable knowledge and creativity out of the reach of readers benefits no one. **For authors, the lack of an online version of their books can be tantamount to oblivion.** For readers, it restricts the universe of available knowledge and culture.

*Authors Alliance*

The Internet Archive's proposal maps out extraordinarily well a mechanism and process for all libraries to participate in a network that will support a vastly increased common collection—literally increasing that collection by several orders of magnitude for the average library.

*Dan Cohen  
Northeastern University  
former Director, Digital Public Library of America*

The Internet Archive's program, funded by the MacArthur Challenge, could be that **new bold idea**, one with global reach in our ever more connected society, **one focused on ensuring no one is left behind** in the race for greater access to knowledge, information access and technological enablement.

*Boston Public Library*

The proposal's objectives of increasing digital access to critical learning and research missing from the online environment matches up with the mission of the Los Angeles Public Library to provide free and easy access to information to enrich, educate, and empower every individual in our city's diverse communities. ... The misperception that all information is available for free on the internet illustrates the need for libraries to develop partnerships to make available the breadth of human knowledge in a digital format.

*Los Angeles Public Library*

This **critical linchpin of democracy** is imperiled by a copyright regime that has yet to catch up with the realities of digital access. The Internet Archive is offering a secure, scalable solution to this challenge while the socio-political system normalizes the access our democracy demands.

*Abby Smith Rumsey*

Our mission of access to information will be significantly furthered by this model, allowing us to share our collections beyond regional boundaries more broadly than has ever been possible, while at the same time **giving our local communities greater access to desired knowledge** held far away.

*San Francisco Public Library*

Without access to the cultures, histories and knowledges that are embodied in books, it is difficult to create reliable public knowledge, on sites such as Wikipedia. And as the internet becomes the default library of the world, and Wikipedia its default encyclopaedia, **the reality is that if you're not online... you don't exist.**

*Whose Knowledge?  
a global, multi-lingual campaign to make knowledge on the internet  
more diverse and plural*



Hundreds of thousands of volunteer Wikipedia editors would be able to include citations from 4 million additional eBooks, with live links that take readers directly into the books themselves, grounding them in the published record. **This project will weave a rich and reliable explanation of our world** into Wikipedia and the web for generations to come.

*Wikimedia Foundation*

We want to ensure that everybody in the world with a qualifying disability will have access to both the Open Library and Bookshare collections for free, expanding access to books for education, employment and social inclusion. **In short, creating a global free library for people with disabilities!**

*Benetech*

ISKME sees the project as advancing an unprecedented opportunity to advance open and freely available curriculum around digitized book content, as a primary outcome of this supported access.

*The Institute for the Study of Knowledge Management in Education*

One of the true joys of life is that derived from reading books. It is always a cherished memory of childhood, a building block of one's growing years and a fundamental part of adult life.

**Unfortunately millions of persons with print disabilities around the world, more especially in developing countries around the APAC and other regions have severely limited access to books.**

The project proposed by The Internet Archive to digitize millions of books in accessible formats is immensely important and timely for us.

*Centre for Internet and Society*

Content will be simple to get. Books that will otherwise be lost will remain in the human record.

**Readers will benefit from access to free, valid and quality information, better able to explore, learn and develop intellectually and emotionally** in a time when funding cuts threaten our ability to fulfill our vital mission.

*Readers First*  
*a coalition of 300 library systems representing 200 million readers*

For the CNI community, we believe that this initiative would be very useful to print-disabled students who need access to a wide range of texts in their college or university program. Universities are under increasing pressure to provide accessible resources to their students and this large-scale program by IA would do much to assist their efforts.

*Coalition for Networked Information*

As Internet Archive makes these formats digital, new opportunities are created to deliver these into today's classrooms and enable **libraries to add their strengths** in addressing the needs of struggling readers.

*Learning Ally*

How can we leverage the extraordinary presence of almost 120,000 libraries in the United States to build literate and knowledgeable communities—the surest, and most cost-effective path to a self-sustaining society? Your very innovative approach, using existing technologies, and respecting author's rights, is **among the most promising directions I have seen.**

*James LaRue, Office for Intellectual Freedom*  
*American Library Association*

The proposed project to bring 4 million books online and ensure they are available to the print disabled around the world would make a major difference to many blind and visually-impaired people in their ability to access the world's knowledge. **Access to information helps provide personal independence, is necessary to succeed in education and employment and essential to participating in society.**

*LightHouse for the Blind and Visually Impaired*

This project allows the sharing of collections and **creates a new model that recognizes the importance of both copyright and provenance.** Just as importantly, this project has the potential to realize enormous cost savings to libraries, savings that can go into building collections instead of slowly and laboriously moving physical materials.

*Sacramento Public Library*

We place a high priority on offering a rich and relevant collection, but libraries are for people and should not be warehouses for books in the modern age. As a library with increasing demands on our spaces for community connections, group learning opportunities and more; Libraries should not be book warehouses, but community forums.

*Multnomah County Public Library (Portland, OR)*

**The project outlined by the IA in their 100&Change proposal holds the promise of bridging one of the most dangerous divides of our time: an informational divide caused by the growing economic inequality in the United States.**

*Michelle Wu, Georgetown University Law Center*



# Evidence of Engagement

## Photos from Key Convenings

